

COMMITTEE HEARING  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
Application for Certification	)	Docket No.
for the Metcalf Energy Center	)	99-AFC-3
(Calpine Corporation and	)	
Bechtel Enterprises, Inc.)	)	
_____	)	

CALIFORNIA ENERGY COMMISSION  
HEARING ROOM A  
1516 NINTH STREET  
SACRAMENTO, CALIFORNIA

WEDNESDAY, JANUARY 3, 2001

3:00 p.m.

Reported by:  
Debi Baker  
Contract No. 170-99-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Robert A. Laurie, Commissioner, Presiding Member

William Keese, Chairman, Associate Member

STAFF PRESENT

Stanley Valkosky, Hearing Officer

Dick Ratliff

APPLICANT

Jeffery D. Harris, Attorney,  
Chris Ellison, Attorney  
Ellison & Schneider  
Calpine Corporation/Bechtel Enterprises

Kenneth E. Abreu, Development Manager  
Metcalf Energy Center

INTERVENORS

Roger Beers, Attorney  
Coyote Valley Research Park

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

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## P R O C E E D I N G S

6:30 p.m.

PRESIDING MEMBER LAURIE: Ladies and gentlemen, good evening. Mr. Valkosky.

HEARING OFFICER VALKOSKY: Thank you, Commissioner Laurie. Today's hearing arises from CVRP's interlocutory appeal of the Committee's November 20, 2000 ruling regarding a motion to compel.

This matter was previously scheduled to be heard at the Commission's December 20th business meeting. At that time, and in light of the submission of additional information, the Committee moved we conduct today's hearing to further discuss any items which may remain at issue.

Based upon the December 27th and 29th filings of CVRP and applicant, respectively, it now appears that much of the substantive dispute has been rendered moot due to information being provided and/or requests having been withdrawn or modified.

To the Committee's understanding only data requests numbers 1D1, 1D2, and 4A may remain the subject of contention.

1                   Regarding 1D1 and 1D2, we further  
2           understand that applicant has agreed to provide  
3           such information as may become available. Number  
4           4A relates to vendor guarantees.

5                   CVRP indicates that it has narrowed its  
6           original request and now seeks either preliminary  
7           or formal guarantees which applicant may have  
8           obtained, and which pertain to various operating  
9           modes for turbine emission rates.

10                   Applicant has apparently agreed to  
11           further consider this request, even though it  
12           continues to object, contending the information  
13           sought is irrelevant, privileged, and that the  
14           vendor guarantees have not, in fact, been  
15           negotiated.

16                   Is that an accurate summary of the  
17           current status, Mr. Harris?

18                   MR. HARRIS: I think it is, with one  
19           refinement. I think, as to 4A, we continue to  
20           object to that one, and I don't see us changing  
21           that position and providing any information about  
22           that particular issue.

23                   HEARING OFFICER VALKOSKY: Okay. Mr.  
24           Beers, is that an accurate summary?

25                   MR. BEERS: That's accurate.

1 HEARING OFFICER VALKOSKY: Okay. So,  
2 that means that all we're talking about is number  
3 4A.

4 Now, as I read the papers that have been  
5 filed, CVRP indicates that it had narrowed this  
6 data request, and seeks only vendor guarantees  
7 regarding turbine emission rates in various  
8 operating modes.

9 Applicant apparently contends that CVRP  
10 has, in fact, broadened the request, as I read it.  
11 And you'll get a chance to correct me if I'm  
12 wrong. The original data request referred to  
13 vendor guarantees for turbines, SCR guarantees of  
14 NOx emissions, and the cooling tower vendor's  
15 guarantee for the drift rate, is that correct, Mr.  
16 Beers?

17 MR. BEERS: Yes.

18 HEARING OFFICER VALKOSKY: Okay. And  
19 now you're only seeking the turbine guarantees,  
20 correct?

21 MR. BEERS: Correct.

22 HEARING OFFICER VALKOSKY: Okay. If you  
23 could proceed and give us your reasons for this.

24 MR. BEERS: Yes. I think there must  
25 have been an overflowing of holiday spirit over

1 the last several weeks, because we really have  
2 narrowed it down essentially to one item, with the  
3 Committee's prompting.

4 And I would like to mention that with  
5 respect to 1D1 and '2, that is still outstanding  
6 in the sense that the applicant has agreed to go  
7 back to its source test firm and determine whether  
8 or not certain information and documents exist  
9 there. And if they do, to provide them to CVRP.

10 And I have every confidence, therefore,  
11 that that information will be forthcoming. But it  
12 hasn't been provided to us to date.

13 And so I talked with Mr. Harris  
14 beforehand and we thought it would be appropriate  
15 for the Committee to retain continuing  
16 jurisdiction over that particular item so that if  
17 we have any difficulty associated with getting the  
18 information, we could come back to the Committee  
19 on that particular item.

20 But, I'm confident we'll be able to get  
21 the information we need there.

22 HEARING OFFICER VALKOSKY: Okay, before  
23 we move off that point, Mr. Beers, Mr. Harris, is  
24 that a correct summary? And if so, do you have  
25 any projected date by when such information will

1 be available?

2 MR. HARRIS: Yes, it is a correct  
3 summary. And I had contact again this morning  
4 with Mr. Rubenstein, who's our air quality  
5 consultant. He's been in contact with the source  
6 test firm.

7 Basically holidays caused them problems  
8 in getting us the information. I would hope to  
9 have that information within the next week to ten  
10 days. By the end of next week, I think, at the  
11 latest.

12 I guess what I would propose is that  
13 upon receipt of that information we would transmit  
14 that to CVRP, and then they can give us an  
15 indication that that is satisfactory in terms of  
16 this outstanding data request.

17 HEARING OFFICER VALKOSKY: Okay, so  
18 we're looking at January 12th, 15th, somewhere --

19 MR. HARRIS: Hopefully sooner. I just  
20 don't know whether the source test firm has had  
21 time to go through all their records. But, you  
22 know, our intent would be to basically pass  
23 through anything that we get, you know, provided  
24 that it's not privileged or otherwise  
25 nondiscoverable.



1                   And if we find something that we  
2           consider to be nondiscoverable, we'll disclose  
3           that and our reasons for believing it to be  
4           nondisclosable.

5                   But, having said that, I'm not  
6           anticipating that we'll find anything. And to the  
7           extent we find anything, we're pretty sure we just  
8           pass this right through to CVRP and then they can  
9           give us their indication as to whether that  
10          satisfies their needs.

11                   HEARING OFFICER VALKOSKY: Okay, thank  
12          you.

13                   MR. BEERS: I think it would be  
14          desirable, perhaps, to put some date for that  
15          production just so it doesn't linger on too long.  
16          I had hoped maybe we'd be able to have a report  
17          about whether or not there was any such  
18          information, and hopefully even the information  
19          itself, before the January 9th prehearing  
20          conference that's been continued.

21                   And if that's possible I think we ought  
22          to shoot for that as a target.

23                   HEARING OFFICER VALKOSKY: Is that  
24          possible, Mr. Harris?

25                   MR. HARRIS: As a target, most

1 definitely. My biggest concern is the third party  
2 we don't control, but --

3 HEARING OFFICER VALKOSKY: No, I  
4 understand that, but --

5 MR. HARRIS: -- but we will make more  
6 the good faith efforts and use that as a deadline  
7 to get it before the 9th to CVRP.

8 And in the meantime we'll keep in  
9 communication with them as to the status of our  
10 contacts with them, as well.

11 HEARING OFFICER VALKOSKY: Okay, well,  
12 we can continue discussion of this matter at the  
13 prehearing conference, and at least to get an  
14 update on it.

15 Okay, please continue, Mr. Beers.

16 MR. BEERS: Then let me move on to the  
17 only item that is currently in dispute and that's  
18 data request 4A, requesting vendor guarantees as  
19 to emission rates.

20 And this information is being objected  
21 to on a variety of different bases by the  
22 applicant. Obviously we seek the information  
23 because who better knows what their equipment is  
24 capable of doing in terms of the pollutants that  
25 it emits, and the amount of those pollutants than

1 the manufacturer of the equipment.

2 So I don't think it's appropriate to  
3 suggest that this kind of information is some  
4 irrelevant to the proceeding. Certainly if the  
5 vendor's best estimate is that its equipment can  
6 do better than what the applicant is estimating,  
7 and asking for as the appropriate limit, then we  
8 should know that.

9 But, conversely, if the manufacturer  
10 believes on the basis of its testing that the  
11 equipment will do worse than what the applicant is  
12 suggesting, we need to know that.

13 And frankly, it's the latter that  
14 prompts one of our concerns about getting this  
15 specific item of information, and that is we  
16 believe on the basis of similar vendor guarantees  
17 or vendor data for the same kind of turbine that  
18 have been produced in prior proceedings on other  
19 power plants before this Commission, that in this  
20 instance the applicant is contending that it can  
21 do better than what the manufacturer is suggesting  
22 is the proper emission rate for the turbines that  
23 it manufactures.

24 And the reason that's a matter of  
25 concern is that for example in the case of PM10,

1       there is no ongoing continuous emissions  
2       monitoring of that that works, so that what  
3       happens is that with respect to PM10 that will be  
4       measured once a year by way of a single source  
5       test that's conducted.

6               And we remain concerned that those kind  
7       of source tests are typically done only under  
8       optimal conditions, and don't necessarily reflect  
9       the true practical state of operation during most  
10      of the year.

11             Therefore, it's relevant to know what  
12      kind of data the vendor has provided with respect  
13      to the --

14             PRESIDING MEMBER LAURIE:  What if there  
15      were better testing procedures?

16             MR. BEERS:  Then that certainly would be  
17      information that this Committee should consider.  
18      In other words we're not suggesting that it's only  
19      the vendor data that should be taken into account,  
20      but simply that that's one piece of evidence  
21      that's relevant to this Committee's determination.

22             PRESIDING MEMBER LAURIE:  Well, explain  
23      to me why you think the promises being made by the  
24      manufacturer are relevant.  The manufacturer is  
25      under no obligation, contractual, condition-wise

1 or anything, to the Energy Commission. The  
2 applicant is contractual through the conditions on  
3 their project.

4 It is the applicant that must promise  
5 and comply with the promises made in meeting the  
6 conditions on the project.

7 So, if the applicant promises to meet  
8 the standards by agreeing to complying with the  
9 conditions, then is it not simply a question of  
10 adequate assurance of compliance?

11 MR. BEERS: Well, let me begin by  
12 indicating that there are a variety of different  
13 pieces of information that this Commission looks  
14 to in determining whether or not the applicant is  
15 proposing the best emissions rate it can achieve  
16 or whether the applicant is proposing something  
17 else.

18 That may come from databases that have  
19 been set up, such as the CATIF database. It may  
20 come from separate calculations done by the  
21 applicant, it may come from source test done on  
22 similar turbines elsewhere, it may come from the  
23 manufacturer of this particular turbine.

24 But all of those help the Committee  
25 judge what the likely emissions rate is going to

1 be for this equipment.

2 Now, if it were simply a matter of the  
3 applicant coming in and saying we promise to do X,  
4 and everything else is therefore irrelevant, then  
5 presumably it would be irrelevant to determine  
6 whether or not the applicant could do better.

7 It would be irrelevant to determine  
8 whether or not the applicant was being realistic,  
9 and therefore whether or not a different limit  
10 ought to be set. And if a different limit were  
11 set does that make you look at different kinds of  
12 equipment to make sure that you really are  
13 achieving the best available control technology or  
14 whether offsets may become necessary.

15 And I guess what I'm saying in the case  
16 of PM10 for example, there is no reliable  
17 continuous emissions monitoring, so that you do  
18 only an annual source test on the thing.

19 So we're asking to receive that data  
20 among a variety of different sources of data,  
21 which would help in judging whether or not the  
22 estimates that's been made by the applicant are,  
23 in fact, estimates supported by the manufacturer  
24 of the equipment.

25 There are, indeed, not just in this

1 case, but in a variety of cases that have been  
2 before this Commission, instances in which this  
3 kind of vendor data has been routinely applied.

4 And let me refer you to the set of  
5 exhibits that we submitted with our initial  
6 petition to compel production of documents, and in  
7 particular the exhibits under tab 4. And there is  
8 one set of vendor data after another setting forth  
9 the manufacture of this very kind of equipment  
10 estimate of what that particular equipment could  
11 achieve in terms of the emission rates or emission  
12 factors for particular categories of pollutants.

13 So that this information has been  
14 provided as a matter of course in the Elk Hills  
15 Power Project, a matter in the Midway Sunset  
16 Expansion Project, a matter in the Three Mountain  
17 Power Project, a matter that was before this  
18 Commission --

19 CHAIRMAN KEESE: Presented by whom,  
20 though? Who has presented this information?

21 MR. BEERS: I think in these instances  
22 the information was provided by the applicant.  
23 And, indeed, one item of information that we  
24 submitted with exhibit 4, --

25 CHAIRMAN KEESE: Did they file it in the

1 case, is that what you're --

2 MR. BEERS: Yes, that's what I'm saying.

3 The exhibits that we got here are, as I understand

4 it, taken from filings in those particular cases.

5 And, indeed, the last item in exhibit 4 is the

6 cover page is the application for certification

7 for the Sutter Power Plant Project, a project

8 proposed by Calpine. And when you turn the page

9 they've got the Calpine Sutter Project guarantee

10 data sheet, which contains emission rates under

11 the category of guaranteed data, which is

12 information, as I understand it, that was supplied

13 to them by the vendor, and in turn was supplied to

14 this Commission in that course of that proceeding.

15 Moreover, in this particular instance

16 the Bay Area Air Quality Management District

17 referred in its final determination of compliance

18 to vendor guarantees on this equipment as

19 providing emission rates that it was relying on.

20 So, we're not really dealing with

21 anything here out of the ordinary in terms of what

22 people have been traditionally providing in these

23 kinds of proceedings.

24 PRESIDING MEMBER LAURIE: Let's assume

25 for a moment that the information, as requested,



1 was provided. And it would be, assuming again  
2 that it would be duplicative of the information  
3 that you have in your hands.

4 You indicated the same equipment, is  
5 that right?

6 MR. BEERS: It's the same kind of  
7 turbine, as I understand it.

8 PRESIDING MEMBER LAURIE: Okay, so let's  
9 say for purposes of discussion the data would be  
10 the same.

11 With that in your hands, then what would  
12 be relevant to you as it relates to the  
13 conditions imposed on this project?

14 So let's say the document you had in  
15 front of you was, in fact, the vendor guarantee  
16 for this project. What would you do with it?  
17 Why would it be then relevant to this Committee?

18 MR. BEERS: Okay. In terms of just  
19 practically what I'd do with it, I'd provide it to  
20 my consultant, number one. That consultant would  
21 make use of that information in terms of the  
22 testimony that he presents.

23 And conceivably I would use it for  
24 cross-examination. In terms of what argument I  
25 would make based on it, if the information in that

1 vendor data was the same as the information that  
2 I've been referring to, this tab in exhibit 4,  
3 what it would show in the case of PM10, for  
4 example, is that the vendor of the equipment  
5 estimates emissions substantially higher than the  
6 applicant has estimated.

7 And we would argue, therefore, that the  
8 applicant is not making a realistic estimate of  
9 emissions, and therefore that has to be taken into  
10 account by this Committee for purposes of  
11 determining whether or not offset thresholds have  
12 been reached; for purposes of determining whether  
13 or not the mode of compliance that's being set  
14 forth in order to achieve best available control  
15 technologies is the proper one in this instance.

16 So that material would provide a basis  
17 for argument in the case of PM10 along the lines  
18 that I mentioned. But in the case of the other  
19 pollutants, just to examine whether or not, in  
20 fact, the emission rates that are being put forth  
21 by the applicant are the emission rates comparable  
22 to what the vendor, itself, says that it can meet.

23 Now, the fact of the matter is I don't  
24 know whether or not the emission rates will be the  
25 same, that would have been supplied data from this

1 vendor to the applicant for this particular piece  
2 of equipment.

3 One of the claims that's been made by  
4 the applicant in this case is that its models of  
5 equipment that it's obtained are better than some  
6 of the ones that were used in the source tests  
7 that were conducted. And therefore the emission  
8 rates on this equipment is expected to be lower  
9 than what were used in the source tests that have  
10 been relied on for various purposes.

11 So, again, receiving the vendor  
12 information, what data has been provided to the  
13 applicant from the vendor of this particular  
14 equipment, would help us in making judgments,  
15 also, about the relationship between the source  
16 tests that come into play and the inferences that  
17 are being drawn from those source tests on  
18 equipment in Pasadena, Texas, and what we can  
19 reasonably expect to happen with respect to the  
20 equipment which will be used with this particular  
21 project.

22 I note, for example, that it's not just  
23 the vendor data or vendor guarantees that I  
24 referenced under tab 4 in our petition to compel  
25 that contained this kind of data, but the

1 application for certification in this very case,  
2 under section 8.1.5.1.1 dealing with criteria  
3 pollutant emissions says the gas turbine, duct  
4 burner and auxiliary boiler emission rates have  
5 been estimated from vendor data, MEC design  
6 criteria, and established emission calculation  
7 procedures.

8 Well, fine. Then let's see the vendor  
9 data that you've been provided with as a means of  
10 our reviewing the sorts of calculations that  
11 you've used and how you've arrived at your  
12 particular determinations.

13 There is an issue raised by the  
14 applicant as to whether or not this particular  
15 material is confidential. And the applicant  
16 relies upon a case cited by it, the Masonite case,  
17 for the proposition that emission factors are  
18 trade secrets, and necessarily confidential.

19 I note that the Committee, itself, in  
20 reviewing this claim of confidentiality in its  
21 prior ruling indicated we agree with CVRP that  
22 applicant's generalized claim of confidentiality  
23 is too nonspecific and recognize that there are  
24 methods to control the disclosure, use and  
25 distribution of genuinely confidential material.

1           I think the Committee was making two  
2 points. One is that there hasn't been any showing  
3 by the applicant that there's any confidentiality  
4 associated with this material that would prevent  
5 it from being produced in this proceeding.

6           And if there were, there are obvious  
7 means of dealing with that. The material could be  
8 provided under seal to the parties. There could  
9 be restrictions on its use or protections provided  
10 for how it would be used in the proceeding.

11           There's a simple one-line statement in  
12 the applicant's response materials most recently  
13 supplied to this Committee in which they suggest  
14 that having to provide this kind of information  
15 would place them at a competitive disadvantage in  
16 their negotiations with the turbine manufacturer,  
17 in this instance, and in their negotiations in  
18 future cases.

19           There's one sentence to that effect.  
20 That's their showing of any confidentiality  
21 associated with this. And I have to say, I don't  
22 understand that.

23           Number one, we're not asking for  
24 anything other than the data that's already been  
25 provided by the vendor to the applicant. So the

1 disclosure of that information in the course of  
2 this proceeding certainly can't disadvantage the  
3 applicant in its negotiations with the vendor,  
4 either --

5 PRESIDING MEMBER LAURIE: Okay, let me  
6 ask a couple questions. Mr. Harris, do you have  
7 any kind of confidentiality agreement with the  
8 vendor regarding this information?

9 MR. HARRIS: These negotiations haven't  
10 taken place yet. We don't have an agreement in  
11 place. I'm unaware of any confidentiality  
12 agreement between us and the vendors as to the  
13 subject matter of the negotiations.

14 HEARING OFFICER VALKOSKY: Mr. Harris,  
15 if the negotiations haven't taken place yet then  
16 how do you explain Mr. Beers, and I assume you're  
17 quoting from the AFC that the emission limits were  
18 based in part on vendor guarantees?

19 MR. HARRIS: I don't think that's what  
20 he said. Can I see the information, Roger?

21 MR. BEERS: Sure. The quotation was  
22 vendor data.

23 MR. HARRIS: Vendor data is a different  
24 thing. And let me go right to, I guess to the  
25 heart of the matter is, you know, you were talking

1       about whether we've narrowed or broadened the  
2       inquiry.

3               In a typical lawyer answer it's both.  
4       It's been narrowed in the sense that instead of  
5       being 4A, 4B and 4C, it's now simply 4A. It's the  
6       turbine. So it's narrowed in that sense.

7               It's broadened in the sense that CVRP is  
8       now asking for vendor guarantee data, either  
9       formal or preliminary, so they've expanded the  
10      scope. Now that they've learned that we haven't  
11      actually negotiated these guarantees, they've  
12      expanded it to try to basically inject themselves  
13      into that current commercial negotiation. And in  
14      that sense the data request has been broadened  
15      significantly. And I wanted to make that point.

16              PRESIDING MEMBER LAURIE: Yeah. If your  
17      witness on air quality responds to the question of  
18      how do you know if you can meet the standards with  
19      the equipment that you're using, and the witness  
20      responds, well, the vendor has guaranteed that.  
21      Then why would it be inappropriate to see some  
22      evidence of that vendor guarantee?

23              MR. HARRIS: I think that misconstrues  
24      what a vendor guarantee is fundamentally. A  
25      vendor guarantee is a commercial relationship

1       between a buyer and a seller. It has everything  
2       to do with the price of the turbine, and nothing  
3       to do with its performance.

4               Simply put, if you're willing to accept  
5       a higher limitation in your guarantee you get a  
6       cheaper turbine. It's that simple. It's wholly a  
7       commercial relationship. It has no effect on the  
8       actual performance of the machine.

9               So, in response to your question I don't  
10      think you would find any air quality witness  
11      relying on a guarantee number.

12              PRESIDING MEMBER LAURIE: Okay, now the  
13      equipment, which is manufactured to certain  
14      specifications, do those specifications include  
15      emission standards, and emission parameters so  
16      that if a piece of equipment is manufactured along  
17      with all the specifications in the equipment,  
18      there's some indication that these are the  
19      parameters of its emissions.

20              So that your witness can say based upon  
21      this equipment, this equipment is, in fact,  
22      capable of meeting these standards, and provide  
23      data to support that. Is that information  
24      available?

25              MR. HARRIS: I'd like Mr. Abreu to



1       answer since he's been involved in some of these  
2       negotiations in the past.

3               MR. ABREU:   This is Ken Abreu.  
4       Commissioner Laurie, the information that we would  
5       be relying on to know that we could meet our  
6       limits is data, data that either we have taken or  
7       others have taken on these machines.

8               It would not be the guarantee, itself.  
9       The guarantee is something we would negotiate with  
10      the vendor on a dollars basis, on a risk basis,  
11      you know, how much more financial liability do you  
12      want to put the vendor at if they don't perform in  
13      the area you would expect --

14              PRESIDING MEMBER LAURIE:   And when you  
15      make reference to data, has that data been  
16      requested and made available to CVRP?

17              MR. ABREU:   Yes, we have provided to,  
18      you know, all of the parties, test data on the  
19      similar machines that we would be using to  
20      Metcalf.

21              MR. HARRIS:   And, in fact, we provided  
22      two separate sets of source test data, which I  
23      don't think any applicant has provided to the  
24      Commission in the past.   And so that data is, I  
25      think, in this case, superior to what you find in

1 a typical case.

2 It has been in the hands of CVRP for  
3 some time now.

4 HEARING OFFICER VALKOSKY: Okay, is the  
5 originator of this data the vendor? I mean, I  
6 understand there is independent --

7 MR. ABREU: No.

8 HEARING OFFICER VALKOSKY: There is no  
9 vendor data, then?

10 MR. ABREU: No, it's data from tests  
11 either that we had performed by a commercial firm,  
12 or that others have had performed, and is  
13 available.

14 HEARING OFFICER VALKOSKY: Do you have  
15 any vendor data available to you? And, again, I'm  
16 going back to the portion of the AFC that Mr.  
17 Beers quoted.

18 MR. HARRIS: I think the two source  
19 tests we provided have that information in them.  
20 And so I think the answer is yes, we provided  
21 everything that we have related to turbine  
22 performance.

23 But, again, we're getting away from the  
24 data request of vendor guarantees and now going  
25 into the substantive issues related to the actual

1 performance of the turbine. So, don't lose sight  
2 of the fact that we're talking about a commercial  
3 deal.

4 And I want to get back to what the data  
5 request talks about, which is vendor guarantee  
6 information. That's different than the source  
7 test data.

8 PRESIDING MEMBER LAURIE: But the point  
9 being is if we determine that the reason the  
10 information being sought is legitimate, then  
11 there's a question of is there any other mechanism  
12 to provide the information.

13 And so if it's the applicant's position  
14 that you're required to meet standard X, and the  
15 machinery you're using can, in fact, based upon  
16 the specifications of its manufacturer, meet that  
17 standard, well, I think that is probably a  
18 relevant legitimate question.

19 So the question in front of us is if you  
20 want to consider the guarantee confidential  
21 because it's only reflective of a commercial  
22 transaction, then what other information and data  
23 from the vendor or other legitimate source is  
24 there to guarantee or provide security that the  
25 standards that you're agreeing to can, in fact, be

1 met?

2 MR. HARRIS: Okay, again, we've moved  
3 beyond the question of guarantees to information  
4 about the way the turbine performs. And I think  
5 the information we've provided, both in the AFC  
6 and our other filings, and particularly in the  
7 source test data is real data about these type of  
8 machines and how they operate.

9 All the assumptions about the operation  
10 of the machines are there, as well. That data is  
11 relevant. I don't dispute that one bit.

12 What we're talking about here is the  
13 vendor guarantee and I'd like to go back to the  
14 question of relevance. We've kind of got onto the  
15 issue of privilege. But, at the appropriate time,  
16 of course, and go back to the first question of  
17 relevance, because I think that issue is one that  
18 the Committee could issue the decision based  
19 solely on the relevance issue. But I'd like you  
20 to do it on both grounds.

21 So, if you'd like I can go into the  
22 relevance question.

23 HEARING OFFICER VALKOSKY: One moment,  
24 Mr. Harris, get right back to you.

25 Mr. Ratliff, does staff, in its

1 independent analysis, rely on vendor guarantees?

2 And if so, to what extent?

3 MR. RATLIFF: Unfortunately we don't  
4 have the technical staff here. I would prefer to  
5 have them answer that question. Certainly, I know  
6 staff has, in some cases, had access to some  
7 vendor guarantees.

8 I'm unsure as to whether or not those  
9 were initially produced by the applicants in those  
10 cases, or whether they were produced by CURE. But  
11 they were introduced into the case in at least a  
12 couple of cases that I've been in.

13 I don't frankly recall them being of  
14 great moment to the case because it's my  
15 understanding that frequently those guarantees,  
16 the guaranteed limits, the warrantied limits may  
17 not be reflective of actual performance, as has  
18 been suggested.

19 So you may have -- my understanding is  
20 the warranties are designed to prevent the  
21 manufacturer of the turbine from having to come  
22 out and work on the turbine or replace it or pay  
23 for damages if it doesn't meet the warranty  
24 provision. And so therefore they tend to be  
25 rather cautious about what they warranty.

1                   We've had testimony in some cases, for  
2                   instance, the PM10 levels that are warrantied are  
3                   frequently far far higher than the actual PM10  
4                   that's emitted by the turbine.

5                   And so I don't know if that's always the  
6                   case. We had similar kinds of testimony  
7                   concerning ammonia slip. I don't know if that's  
8                   always the case. I'm not technically proficient  
9                   to answer that question. And I can't say that it  
10                  would strike me as necessarily irrelevant, but it  
11                  doesn't necessarily strike me as particular  
12                  meaningful, either, from the staff's perspective.

13                  Certainly source test data is what the  
14                  staff has tended to rely on in terms of trying to  
15                  look at performance, and that's really about as  
16                  much as I can say on this issue. It really isn't  
17                  the staff's -- I mean the staff management has not  
18                  really instructed me to take a position on these  
19                  data requests, whether or not they are relevant or  
20                  not relevant.

21                  But, originally we weighed into the  
22                  issue for different issues, not the ones  
23                  concerning the grounds that are being discussed  
24                  today. And so we don't really have a position on  
25                  whether or not the warranty is irrelevant or

1       useful piece of information.

2               HEARING OFFICER VALKOSKY:  Is it staff's  
3       position that sufficient air quality information  
4       has been submitted in order to perform your  
5       analysis?

6               MR. RATLIFF:  Well, I've talked to the  
7       witnesses in both the air quality and public  
8       health areas, and they thought that the data that  
9       they had was complete.

10              They were not requesting further data.  
11       They had no desire to issue further data requests.

12              HEARING OFFICER VALKOSKY:  Mr. Beers, in  
13       terms of focus, why is not the key point, at least  
14       as I understand applicant contends, the emission  
15       limit memorialized in the condition of  
16       certification?  I mean, under the law, that's what  
17       they've got to meet, correct?

18              Now, I can understand that this other  
19       information can be viewed as corroborating, but  
20       what in point of fact under the law they have to  
21       meet whatever the limit is.  That's established by  
22       the District.

23              So, why is not that the chief point of  
24       focus?

25              MR. BEERS:  One of the responsibilities

1 of this Commission is to determine what limits are  
2 appropriate. And it seems to me you need a  
3 variety of information about the likely emissions  
4 from the particular kinds of equipment that are  
5 being proposed here in order to make a judgment  
6 about whether or not the emission limits that have  
7 been adopted really conform to the legal  
8 requirements that they're supposed to meet.

9 Secondly, as I've indicated before, one  
10 of the arguments that's being made by the  
11 applicant is that they have a better model of this  
12 particular turbine than the one used in certain  
13 startup tests that were conducted in Pasadena.

14 And that they expect, therefore, that  
15 the emissions rates indicated by those source  
16 tests in Pasadena will not, to that degree, be  
17 indicative of what this facility will do, but  
18 rather that this facility will do better. Well,  
19 fine. Let's see what the manufacturer of this  
20 newer model has to say about that model.

21 We're not talking about anything that's  
22 at all mysterious here. Under tab 4, one of the  
23 items that's in there is an item that under the  
24 letterhead of Siemens Westinghouse and it's a  
25 quotation for the Midway Sunset Expansion Project.



1 and it gives you what Siemens Westinghouse  
2 believes are the appropriate parameters in terms  
3 of emissions rates for its equipment.

4 This is something that is typically  
5 obtained by everybody who wants to build a power  
6 plant when they go to a manufacturer of a turbine  
7 or other equipment and say, what will this piece  
8 of equipment do for us in terms of this kind of  
9 information.

10 Now, this isn't a guarantee. But it is  
11 vendor data and it is vendor data that, as I  
12 understand it, typically then forms the basis for  
13 the guarantees that are later commercially  
14 negotiated --

15 HEARING OFFICER VALKOSKY: Okay, okay,  
16 so what you're really looking for, what CVRP is  
17 really looking for is any additional data as  
18 opposed to a guarantee, as Mr. Abreu and Mr.  
19 Harris view it? The guarantee being the  
20 commercial relationship.

21 MR. BEERS: The reference to a -- first  
22 of all, my understanding is different than theirs.  
23 My understanding is that what you see right here  
24 in terms of the initial quote, is typically what  
25 gets carried forward into the commercially

1 negotiated document.

2 But the commercially negotiated document  
3 is irrelevant at this point because I accept what  
4 they're saying, that the final commercial  
5 guarantee has not yet been negotiated.

6 But what has been provided to them is  
7 the data which the vendor estimates for purposes  
8 of what it thinks its equipment can do.

9 Now, we use the term vendor guarantee as  
10 a means of providing an umbrella term for all of  
11 that different data which the manufacturer of the  
12 equipment has provided with respect to its  
13 particular equipment. And, again, it's  
14 interesting that when you turn to the last  
15 document in the set that I referenced, the  
16 document in the application for certification for  
17 the Sutter Power Plant from Calpine, the  
18 information that's set forth there is the  
19 information from the vendor. And that information  
20 is referred to as guaranteed data.

21 Now, again, I have no basis for knowing  
22 that there was anything negotiated in terms of a  
23 contract --

24 HEARING OFFICER VALKOSKY: Okay, I'm  
25 just trying to get through. I mean, part of what

1 we're having, seems to me, is a semantic  
2 difficulty, you know, i.e., --

3 MR. BEERS: I think it's one of the  
4 semantic difficulties that's kind of been  
5 constructed after the fact. There really has  
6 never been any question from a long time ago about  
7 what kind of information we were seeking.

8 I mean we set forth in tab 4 here some  
9 examples of the very kind of information that we  
10 were seeking that's been filed in other  
11 proceedings before this Commission.

12 HEARING OFFICER VALKOSKY: I'm sorry,  
13 Mr. Harris, I interrupted you. Please continue.

14 MR. HARRIS: Thanks. I think it isn't a  
15 semantic difference, I think it's a substantive  
16 difference. And, you know, we are in a situation  
17 now where CVRP has discovered that since these  
18 things aren't negotiated they're not available;  
19 they've gone back and expanded their request to  
20 ask for informal or formal information about  
21 vendor guarantees.

22 And I do want to get back to the  
23 question of relevance here, because I think before  
24 you even reach the issue of confidentiality you  
25 need to figure out whether this is something that

1 the Commission regularly does have within its  
2 possession as it goes forward.

3 And my answer to that is that it is not.  
4 And let me explain that. As we've said the vendor  
5 guarantee is precisely that, it's a commercial  
6 relationship between a turbine seller and a  
7 turbine buyer. To the extent you're willing to  
8 take more risk you get a cheaper turbine. That's  
9 the essence of a vendor guarantee.

10 The numbers that matter from the  
11 Commission's perspective is the number in the  
12 license. That's the legally enforceable  
13 mechanism. And we provided on simple example in  
14 our filing, I think which is really illustrative.  
15 And I'd like to walk through it real quickly.

16 And basically what that says is that if  
17 your emissions limit in your license is 10 units  
18 of whatever, and your vendor guarantee is 11, if  
19 the machine performs at 11, it's not a safe harbor  
20 to say I hit my vendor guarantee.

21 You have to take corrective actions to  
22 get down to the 10, because that's the licensing  
23 requirement and that's where you get to. So I  
24 think that's very instructive from the  
25 Commission's question of relevancy. It's the

1 numbers in the license that matter, it's not the  
2 numbers in the commercial negotiations that  
3 matter.

4 A second example, and this one's not in  
5 our filing, but I think it's brief and it's  
6 illustrative. Calpine Bechtel, as a corporation,  
7 actually not as a corporation, as a joint venture,  
8 the Sutter Project was a Calpine project, Calpine  
9 Bechtel, as a joint venture, could make the  
10 business decision today that they could elect not  
11 to have turbine vendor guarantees.

12 We could just say we're going to take  
13 the risk. Or we don't feel like it's necessary,  
14 maybe we have a joint venture with a turbine  
15 manufacturer. You can easily construct a scenario  
16 where as a business judgment applicant decides not  
17 to have a vendor guarantee.

18 And based upon that business judgment  
19 you don't have any information like this. How can  
20 that be relevant to this proceeding?

21 PRESIDING MEMBER LAURIE: Mr. Harris,  
22 question. Let me go back again to the moment that  
23 you put your air witness on the stand. And you or  
24 somebody else asks the witness, are you aware the  
25 emission standards to be imposed upon this

1 project; answer, yes.

2 Next question, is the equipment being  
3 utilized for this project capable of meeting those  
4 standards; yes. How do you know that; well, the  
5 vendor provided us data. Or okay, --

6 MR. HARRIS: That person --

7 PRESIDING MEMBER LAURIE: -- so what is  
8 the next question? What's going to allow that  
9 witness to say yes, the information I have in  
10 front of me that I based my opinion on is as  
11 follows?

12 MR. HARRIS: I was going to be sarcastic  
13 and say that person wouldn't be working for us.  
14 But that is literally true, because they would not  
15 be offering a professional opinion based upon a  
16 vendor guarantee.

17 The would be offering a professional  
18 opinion based upon the source test data that we've  
19 provided, not once, but twice. Again, data that  
20 goes beyond data in any other case before you.

21 They'd be offering a professional  
22 opinion based upon their experience with similar  
23 turbines. I can't even begin to think of all the  
24 bases on which Gary Rubenstein could offer his  
25 professional opinion.

1           The vendor guarantee would not form the  
2       basis for their opinion. And in fact, in our  
3       case, the air quality expert who will be  
4       testifying is not a party to the negotiations for  
5       the turbine vendor guarantees. That's the  
6       commercial relationship. He's not an attorney;  
7       they don't need him to participate in those  
8       negotiations.

9           Again, that relates solely to the price  
10      of the turbine. So the hypothetical that you've  
11      posited is not one that would occur in a scenario.  
12      You certainly would never have an opinion based  
13      solely on a vendor guarantee.

14           I want to raise just kind of a third  
15      example on the question of relevance. I mean  
16      we've had, now I think the Commission's approved  
17      seven projects since deregulation, beginning with  
18      Sutter, and most recently with the Sunrise  
19      Project.

20           I don't know whether any or all or some  
21      of those projects had vendor guarantees when they  
22      were approved. And I don't know whether you all  
23      know that, either. But I think the fact that I  
24      don't know, and people who follow the Commission  
25      couldn't tell you for sure whether those approved

1 projects have vendor guarantees is further  
2 evidence that this information is not reasonably  
3 necessary. And that's a standard in your  
4 regulations, 1716, it's not reasonably necessary  
5 for a decision because it is a commercial  
6 arrangement that affects the price of the turbine.

7 PRESIDING MEMBER LAURIE: But could it  
8 be argued that the decisions were based not  
9 necessarily on vendor guarantees, or not at all on  
10 vendor guarantees, but rather on data provided by  
11 the vendor as contained in table 4, or exhibit 4?

12 MR. HARRIS: To the extent that data is  
13 relevant, Mr. Beers has it. It's not only before  
14 him, he's collected it and provided it back to  
15 you. The decisions of other applicants that  
16 provided that information. And I'm not sure these  
17 are actually vendor guarantees; in fact, I'm  
18 pretty sure they're not.

19 PRESIDING MEMBER LAURIE: Yes, well,  
20 he's indicated they're probably not vendor  
21 guarantees, but they're data that might or might  
22 not eventually end up in a guarantee.

23 MR. HARRIS: And Mr. Beers and his  
24 client are free to introduce that evidence into  
25 the proceeding and take a position based upon that



1 evidence. There's nothing stopping them from  
2 doing that. It's not relevant to the performance  
3 of this turbine.

4 The relevant information that's in their  
5 hands is that source test data. And --

6 PRESIDING MEMBER LAURIE: Okay, but if  
7 there's vendor data that was relevant to other  
8 proceedings, that's not the subject of a  
9 confidential guarantee commercial transaction,  
10 then why is there not vendor data available in  
11 this proceeding on similar machines?

12 MR. HARRIS: You're asking me to  
13 speculate. For all I know those guarantees were  
14 negotiated. Those people never had an opportunity  
15 or never desired to buy another turbine, so there  
16 was no harm that they considered. I couldn't tell  
17 you why other folks make that information  
18 available.

19 But the fact --

20 PRESIDING MEMBER LAURIE: Well, those  
21 were Calpine projects, right?

22 MR. HARRIS: The Sutter Project was a  
23 Calpine project, and I'm not sure exactly what  
24 this information is before us. But, again,  
25 remember we're talking about other projects that

1 have been approved that didn't have the same data,  
2 and we're back to the basic question of relevance.

3 PRESIDING MEMBER LAURIE: I'm not doing  
4 a very good job trying to explain myself, so let  
5 me try it again.

6 If it's determined that the source data  
7 leading the witness to the conclusion that the  
8 equipment can meet standards is relevant, and I  
9 think a fair argument might be able to made that  
10 it is, and you take the position that the vendor  
11 guarantee is not the data you used to reach that  
12 conclusion, then there's some other data.

13 And if that some other data either has  
14 already been supplied, or can reasonably be  
15 supplied as an alternative, well, that's relevant  
16 for us to look at in this question.

17 And it appears as if some data, not  
18 vendor guarantees, but some vendor-based data has  
19 been made available in other proceedings, then the  
20 question would arise as to why it's not available  
21 here. That is not confidential or privileged,  
22 that provides a basis for your expert to say we  
23 can meet our conditions.

24 MR. HARRIS: There is other data. It's  
25 not the subject of this data request. It's the

1 data that we provided in the source tests, the two  
2 source tests we provided to the intervenors and  
3 served on everybody in this proceeding.

4 And so the other data does exist. And  
5 what we have before us here is a question related  
6 to a vendor guarantee. That doesn't mean that --  
7 what it does mean is that the other data's  
8 available. That's not the data of the subject of  
9 the motion that's before you today.

10 MR. ABREU: Let me just add, you know,  
11 in going through the air district process, and in  
12 going through the staff's process, the FSA, we  
13 were asked to provide data to support emission  
14 limits that we were proposing. And we did do  
15 that. It just wasn't vendor guarantee data.

16 PRESIDING MEMBER LAURIE: And that data  
17 is public data?

18 MR. ABREU: Well, we submitted -- it's  
19 whatever data we submitted for the air district  
20 and for the staff of the CEC has been distributed.

21 HEARING OFFICER VALKOSKY: Okay, that's  
22 been provided to all the parties. And, again, I  
23 guess I disagree with Mr. Harris and Mr. Beers.  
24 At least in my mind it still seems to be at least,  
25 in part, a semantic problem.

1                   Mr. Beers, I heard you say that you  
2           accept the fact that the guarantees are not yet  
3           negotiated, is that correct?

4                   MR. BEERS:   Correct.

5                   HEARING OFFICER VALKOSKY:   Okay.   So  
6           then it seems to me that the discrete question is  
7           for Mr. Harris, is there any vendor-generated data  
8           supporting your emission limits which you have not  
9           provided to the other parties in this proceeding?  
10          I think it gets down to that.   Or it gets awfully  
11          close to that.

12                  MR. HARRIS:   Okay, I'm going to let Mr.  
13          Abreu answer because he has more data on what the  
14          joint venture is up to.

15                  HEARING OFFICER VALKOSKY:   Okay.

16                  MR. ABREU:   As far as the actual  
17          commercial guarantees that we would get for the  
18          turbines on Metcalf, Calpine and Calpine/Bechtel  
19          have a fleet of turbines that we have on order  
20          that we're going to use for various projects  
21          around the country and in the Bay Area.   And we  
22          actually negotiate the final terms when we issue a  
23          purchase order for the specific turbine, which we  
24          would do when we have an EPC contract put in  
25          place, which we're not doing at this point in time

1 on Metcalf. And will probably not do until we get  
2 to the time of the CEC decision before we would  
3 issue our actual EPC contract.

4 At that time we would finalize a turbine  
5 order and guarantees.

6 HEARING OFFICER VALKOSKY: Okay, but  
7 that's going to the guarantee. My question is  
8 preliminary to that. Is there any vendor-supplied  
9 data that --

10 MR. HARRIS: I don't think there's  
11 anything that's --

12 HEARING OFFICER VALKOSKY: -- that is  
13 available to you that has not been submitted to  
14 the parties to support the emission limitations?

15 MR. HARRIS: I don't believe there's  
16 anything. I think they have everything that we  
17 have that's on this issue.

18 You've heard Mr. Abreu describe the  
19 process that the joint venture goes through in  
20 lining up the turbines. So I think the short  
21 answer is for this project, you know, when we get  
22 to the EPC contractor stage, that's when we would  
23 negotiate the actual vendor guarantees.

24 In terms of preliminary information the  
25 whole reason the joint venture is here today, and

1       there was a lot of good holiday spirit in  
2       narrowing these issues down, the whole reason that  
3       the joint venture is here today is because on a  
4       going-forward basis, this is an important  
5       commercial issue.

6               And to the extent this Commission  
7       attempts to compel the type of data you're talking  
8       about, we are placed at a competitive disadvantage  
9       in a series of ongoing negotiations. And that's  
10      why the stakes are --

11             HEARING OFFICER VALKOSKY: Okay, just --  
12      just a second, Mr. Harris, --

13             MR. HARRIS: -- where they are.

14             HEARING OFFICER VALKOSKY: Mr. Beers, is  
15      CVRP's interest the commercial elements of the  
16      guarantee, as applicant has characterized it?

17             MR. BEERS: No.

18             HEARING OFFICER VALKOSKY: Okay.

19             MR. BEERS: Let me -- I can't believe  
20      that we're --

21             HEARING OFFICER VALKOSKY: Yes, I  
22      mean --

23             MR. BEERS: -- two ships passing in the  
24      night here.

25             I just bought a car for my daughter.

1 Before I bought that car for my daughter I looked  
2 up what information the vendor could provide me  
3 about the gas mileage I would get, about all of  
4 the different features of the car, about how it  
5 would be expected to perform.

6 I looked for information from other  
7 sources on that. You know, I could have had  
8 somebody do some tests in Pasadena, Texas on  
9 similar cars, if I'd wanted to.

10 But it would have been irresponsible of  
11 me to buy the car without finding out from the  
12 maker of the car what that maker thought the car  
13 was capable of doing, or not doing.

14 Likewise, here we have somebody buying a  
15 turbine Now, they've indicated that they went to  
16 Pasadena, Texas and they got some similar  
17 turbines, which, in some places they describe as  
18 being different than the ones they're going to  
19 order for this one, but they went there and they  
20 got some similar turbines and they did some source  
21 tests on them. And they provided us with that  
22 information.

23 You can't tell me they have no  
24 information from the vendor of the turbines  
25 they're going to buy about the way those turbines

1 will perform. We've got that kind of information  
2 here --

3 HEARING OFFICER VALKOSKY: Right, and  
4 just hold it right there. Now, this is exclusive  
5 of any cost or commercial arrangement, right?

6 MR. BEERS: They said they haven't  
7 entered into any commercial arrangement, but --

8 HEARING OFFICER VALKOSKY: Right, --

9 MR. BEERS: -- I cannot believe they  
10 don't have this kind of information.

11 HEARING OFFICER VALKOSKY: Okay, and  
12 this is the distinction I've been unsuccessfully  
13 trying to draw here --

14 PRESIDING MEMBER LAURIE: I understand  
15 it.

16 (Laughter.)

17 HEARING OFFICER VALKOSKY: Your  
18 interests are not in the cost or the commercial  
19 arrangements. You just want that backup  
20 information, right?

21 MR. BEERS: Correct.

22 HEARING OFFICER VALKOSKY: Okay, now  
23 that's what we're looking at, Mr. Harris.

24 MR. HARRIS: Okay, let me respond. To  
25 the extent he doesn't want commercial information,



1 I feel better. The ships are coming closer, which  
2 may or may not be a good thing.

3 To the extent he wants generic  
4 information on what these turbines do, the EPA has  
5 webpages full of information about these type of  
6 turbines, and how they perform.

7 And in addition to making that  
8 information available, we've done two source  
9 tests.

10 So to the extent the information is  
11 publicly available, you know, they have an  
12 obligation to go get it. To the extent they asked  
13 us questions about it, we went out and did two  
14 more source tests.

15 HEARING OFFICER VALKOSKY: Okay, the  
16 question is not whether EPA has it available. The  
17 question is, in addition to your source tests, do  
18 you have any more of that information available.

19 I think, Mr. Beers, would you agree  
20 that's the point we're looking at?

21 MR. BEERS: That's the point. In other  
22 words, there were webpages that I could have  
23 looked at regarding my daughter's car, and some of  
24 them were EPA webpages, but --

25 HEARING OFFICER VALKOSKY: Exactly.

1                   MR. BEERS:  -- I also wanted to find out  
2                   what General Motors had to say about it.

3                   HEARING OFFICER VALKOSKY:  Right.  
4                   Understood.  So I think that's the discrete  
5                   question we're looking at.  I mean, what's the  
6                   answer, yes or no?

7                   MR. HARRIS:  As far as I know we have  
8                   given them everything that we have, and we've also  
9                   pointed them to publicly available information.  
10                  And so in that sense, you know, we went above and  
11                  beyond with our previous filing expressly to take  
12                  these issues off the table.

13                  And so we've directed them to publicly  
14                  available sources, and I think we provided them  
15                  with all relevant nonprivileged information that  
16                  we have in our possession.  Are those the magic  
17                  words that --

18                  HEARING OFFICER VALKOSKY:  I'm not  
19                  looking for magic words.  I'm just trying to --

20                  MR. HARRIS:  I am, I'm sorry.

21                  HEARING OFFICER VALKOSKY:  Mr. Beers.

22                  MR. BEERS:  If the answer, and I think  
23                  I'd like this in some kind of verified response,  
24                  if the answer is that Calpine/Bechtel has never  
25                  sought any information from the turbine vendor,

1 and has never received any information from the  
2 turbine vendor as to the manner in which this  
3 equipment will operate, then, fine, let's put it  
4 on the record that way.

5 MR. HARRIS: Let's go back to the data  
6 request, though. That's not your data request.

7 PRESIDING MEMBER LAURIE: Well, okay,  
8 let's put that aside for a moment. Maybe you can  
9 make another data request.

10 If the question is legitimate, are you  
11 in a position to answer his question today?

12 MR. HARRIS: I've answered it to the  
13 best of my ability. We provided him with all  
14 nonprivileged, relevant information that we have  
15 in our possession.

16 PRESIDING MEMBER LAURIE: Are you  
17 claiming privilege over information from the  
18 vendor that you do have?

19 MR. HARRIS: I'm not even sure I can  
20 answer the question given that we're dealing with  
21 a fleet of turbines that are being negotiated as  
22 part of an overall Calpine/Bechtel joint venture  
23 stance.

24 HEARING OFFICER VALKOSKY: Right, right.  
25 It's my interpretation of what Mr. Beers said,

1 he's not really interested in all the bulk rate  
2 you get on the turbines, or anything like that.

3 MR. HARRIS: It sounds like though he is  
4 interested in the information that forms the basis  
5 for a commercial negotiation.

6 HEARING OFFICER VALKOSKY: No, I think  
7 we've taken that off the table.

8 MR. HARRIS: Well, that's the only  
9 purpose of providing data in an exchange between a  
10 turbine vendor and the turbine purchaser.

11 HEARING OFFICER VALKOSKY: No, I think,  
12 at least -- and, Mr. Beers, please correct me if  
13 I'm misinterpreting you -- but basically what he  
14 would expect, and I don't know if this expectation  
15 is correct or not. The expectation is that you're  
16 going to X turbine manufacturer knowing, I mean  
17 you know about what your permit limits are going  
18 to be. And you say, do you have any information  
19 that will make us feel more comfortable that your  
20 turbine, should we choose to buy it from you, will  
21 be able to meet these permit limits.

22 And that's -- Mr. Beers, is that  
23 correct? That's the kind of information we're  
24 looking for?

25 MR. HARRIS: Okay, there's two aspects

1 to that. The answer is, number one, it's either  
2 publicly available information already and it's on  
3 the EPA website and it's on other publicly  
4 available sites.

5 Or, it's information provided solely for  
6 the purpose of negotiating a commercial  
7 arrangement between a buyer and a seller.

8 PRESIDING MEMBER LAURIE: Well, I have a  
9 hard time with that, Mr. Harris. I think the  
10 analogy that Mr. Beers stated previously is valid.

11 You know what the standards are going to  
12 be that you have to meet. When you talk to a  
13 vendor you're going to ask, can you meet these  
14 standards. And the person will either say yes or  
15 no. But you're going to ask for more than yes or  
16 no, either in your -- I don't know what  
17 documentation you use to buy the turbines, but  
18 somewhere in there there's some specifications  
19 that the vendor is agreeing to meet when they  
20 supply the equipment.

21 Otherwise you're buying the equipment  
22 and you don't know whether or not it meets the  
23 standards from representations made by the vendor?

24 MR. HARRIS: The information that is  
25 provided is the basis -- it's a starting point for

1 the commercial negotiation. It's not a UL lab  
2 approved analysis of what a turbine can do. It  
3 includes a margin for negotiating purposes, and  
4 also a margin for setting price.

5 And so what you're not getting in that  
6 context is, like I said, a generic third-party  
7 analysis of how this turbine can perform. What  
8 you're getting in that context is an opening bid  
9 in the negotiation.

10 It's not, as I understand it, it is not  
11 a set of data that says here's how this turbine  
12 can perform. Here's a range of performance.

13 To the extent that data is relevant,  
14 it's publicly available through EPA.

15 MR. RATLIFF: If I could, I wonder if  
16 that's really the question. It seems like we  
17 aren't -- I think we seem to have clarified that  
18 we aren't really talking about these data requests  
19 and the requests for vendor guarantees.

20 We're talking about data that has to do,  
21 it sounds like we're talking about source test  
22 data from any source available.

23 And staff has, at least in my  
24 experience, relied on source test data. And I was  
25 under the impression that that data was a matter

1 of public record.

2 And I'm wondering, are we talking about  
3 data here that is not a matter of public record,  
4 that isn't source test data that has been taken by  
5 public agencies? Or are we talking about stuff  
6 that is, in fact, in the public record? It's not  
7 clear to me what we're talking about, that we're  
8 arguing about right now.

9 MR. BEERS: You know, to get back to the  
10 example that's been used, I used the hypothetical  
11 of buying a car for my daughter. The other  
12 hypothetical that was raised was that of buying a  
13 fleet of turbines.

14 Well, if I were buying a fleet of cars,  
15 you can be sure that I would want to know from the  
16 manufacturer how does your equipment perform.  
17 What standards do you expect it to be able to  
18 meet.

19 And I can't believe that I'd go into the  
20 energy business of building a power plant and not  
21 get information from the turbine vendor about how  
22 the turbine was expected to operate.

23 Now, it may be that some of this  
24 information can be found on EPA websites. It may  
25 be that we could go to Pasadena and do source on

1 similar sorts of equipment.

2 But you can't tell me that the vendors  
3 don't have their own information to provide about  
4 how they think, as the manufacturers of this  
5 equipment, it will perform in one of the most  
6 important respects it's expected to perform,  
7 namely meeting air quality standards.

8 Now, if the answer to that is we've  
9 never gotten any of that information, we've never  
10 asked for it from the vendor, then so be it. But  
11 that's never been the response that we've ever  
12 gotten so far. We're not looking for third-party  
13 data. We're not looking for additional source  
14 tests out in Pasadena. We're just looking for the  
15 data they received from the vendor similar to  
16 what's been supplied in other cases about what the  
17 vendor believes the equipment is capable of doing.

18 HEARING OFFICER VALKOSKY: Okay, once  
19 again I'm going to try this once again. Mr.  
20 Harris, do you have any additional data provided  
21 by the vendor regarding how they believe the  
22 turbine will operate?

23 MR. HARRIS: I think the answer is no.  
24 And let me clarify, because there will always be  
25 questions.



1           The machine's performance, how will that  
2       machine perform, that information is publicly  
3       available. And I don't know whether CVRP has ever  
4       talked to a turbine manufacturer or been to their  
5       website, but there is some publicly available  
6       information --

7           HEARING OFFICER VALKOSKY: When you say  
8       that, is that what Mr. Beers is referring to as  
9       the operating range, the operating parameters?

10          MR. HARRIS: My understanding is the  
11       operating information would be publicly available  
12       from EPA, among other places.

13          HEARING OFFICER VALKOSKY: Okay.

14          MR. HARRIS: And so that's the basis of  
15       my answer. And I wanted to be clear about that.

16          MR. RATLIFF: Well, can I ask the  
17       applicant, if we're talking about an emissions  
18       limitation like NOx for instance, the vendor may  
19       tell you how much NOx is created by a turbine, I  
20       suppose. But does that tell you what the  
21       emissions are, or is that going to be data that  
22       comes from the catalyst maker?

23                I mean who is guaranteeing what here? I  
24       know that in some of our cases the actual warranty  
25       information that's been bandied about had to do

1 with control systems and not with the turbine,  
2 itself.

3 And so I'm wondering, is the turbine  
4 vendor data the one that really is going to tell  
5 you what is possible in terms of control? Or is  
6 it going to be some other set of data?

7 MR. ABREU: The data request asks for a  
8 guarantee. That's what the data request asked  
9 for, and so that's what we were responding to. A  
10 guarantee to us is a commercial term.

11 At the end of the day you might wind up  
12 getting a guarantee perhaps from your EPC  
13 contractor, your engineering construction firm,  
14 who may wrap in guarantees to protect himself from  
15 turbine vendors, from catalyst vendors and from  
16 others.

17 So, when we're talking about guarantees,  
18 we're talking about something we don't have. All  
19 right?

20 HEARING OFFICER VALKOSKY: Right, and  
21 then --

22 MR. ABREU: Then the question was in  
23 terms of data. So let's make that clear. If  
24 we're talking about a guarantee, we don't have  
25 that now, it doesn't exist.

1                   And it may come from a turbine  
2           manufacturer, it may not. We may get it from an  
3           EPC contractor.

4                   In terms of data from the vendors, you  
5           know, Westinghouse, which is who we're looking at  
6           providing the turbine for Metcalf, has publicly  
7           available -- they'll tell you if you call them on  
8           the phone, you know, what's your standard  
9           performance on one of these machines; what are  
10          your standard guarantees on emissions; that  
11          information's available. Obviously, Mr. Beers, we  
12          have that.

13                  And everybody else can get it or have  
14          it, you know, just by calling them up on the phone  
15          or going to their website, or asking for their  
16          literature. That's probably what a lot of this  
17          information is here, just their standard, off-the-  
18          shelf vendor information that you get as a  
19          starting point for talking to them about buying  
20          the machine.

21                  Does that help, Stan?

22                  MR. BEERS: I'm always confused by a  
23          response which suggests when somebody has certain  
24          information that it's somehow easier for me to go  
25          searching on the worldwideweb to get it, than it

1 is for them simply to hand it over to me.

2 MR. HARRIS: There is an aspect of that  
3 here. We're not required to be clerical staff for  
4 CVRP. We're obligated to provide information that  
5 we have in our possession that is reasonably  
6 necessary that you can't get through other means,  
7 as well.

8 And so, we won't be obstructionist, but  
9 we're also not obligated to serve to provide you  
10 with publicly available information.

11 Having said that, to take a lot of these  
12 issues off the table, we did exactly that. Went  
13 out to the CARB website and got information. We  
14 went out to the Bay Area District. We went to  
15 other sources and got publicly available  
16 information and bundled it up.

17 In this case I think what this boils  
18 down to then, are you asking us if we will go  
19 gather publicly available information from  
20 websites and calls to turbine vendors and provide  
21 that to you? Is that the essence of where we are?

22 HEARING OFFICER VALKOSKY: Mr. Beers, is  
23 it?

24 MR. BEERS: No, it isn't the essence of  
25 where we are. I've pointed to some documents that

1       were prepared, in this case prepared by  
2       Westinghouse, very specific to a particular power  
3       plant, relating to the performance of its  
4       equipment, and setting forth what it expected the  
5       equipment to be able to do in terms of emissions.

6               HEARING OFFICER VALKOSKY: Right, and,  
7       yes, you have. Now, --

8               MR. BEERS: And --

9               MR. HARRIS: And that's their standard  
10       performance data? Is that what you're pointing  
11       to?

12              MR. BEERS: No, I'm pointing to one that  
13       has their --

14              MR. HARRIS: Because that's not a  
15       guarantee --

16              MR. BEERS: -- letterhead on it, and  
17       it's Midway Sunset Expansion Project, and  
18       presumably was obtained by the proponents of that  
19       project --

20              MR. HARRIS: Well, I guess my question  
21       would be, is this a set of standard operating  
22       data, or is it a project-specific document? I  
23       don't know the answer to that question --

24              HEARING OFFICER VALKOSKY: We don't know  
25       the answer to that.

1                   MR. HARRIS:  -- but I think it's  
2           relevant.  If it is not a project-specific  
3           document, --

4                   HEARING OFFICER VALKOSKY:  We don't know  
5           the answer to that, Mr. Harris.  I think the  
6           question is do you have any information similar to  
7           that information that you have not provided to the  
8           parties?  And if the answer is no, then you don't  
9           have it.  If it's yes, then the question is  
10          whether you should provide it.

11                  MR. HARRIS:  The answer right now is no.  
12          But, you know, I want to say subject to check, you  
13          know, it's not a small company.

14                  HEARING OFFICER VALKOSKY:  Okay.  No,  
15          I --

16                  MR. HARRIS:  And there are a lot of  
17          different projects.  And I'm willing to check.

18                  HEARING OFFICER VALKOSKY:  Okay, and  
19          when can you check by and inform everyone?

20                  MR. HARRIS:  Well, what am I checking  
21          for, though?  I mean if I'm checking for standard  
22          vendor available information --

23                  HEARING OFFICER VALKOSKY:  Okay, no, I  
24          would say, as I understand --

25                  MR. HARRIS:  -- I can do that --

1                   HEARING OFFICER VALKOSKY:  -- Mr. Beers'  
2           contention, that it is information similar to that  
3           behind tab 4 which would basically be project-  
4           specific regarding to the Westinghouse turbines  
5           for the Metcalf Project, is that correct, Mr.  
6           Beers?

7                   MR. BEERS:  Or if Metcalf calls up and  
8           says, you know, here's the nature of the project  
9           we want, here are the nature of the turbines we'd  
10          like.  Tell us how they'll operate and they get  
11          back some information.  That's what I want.

12                  HEARING OFFICER VALKOSKY:  We're looking  
13          for additional project-specific, if it exists,  
14          additional project-specific information such as  
15          that on the reference part of tab 4.

16                  MR. HARRIS:  Okay, I'm not trying to be  
17          difficult, but I want to understand how that's  
18          different than the other publicly available  
19          information.

20                  HEARING OFFICER VALKOSKY:  I don't know  
21          if it is.  And I --

22                  PRESIDING MEMBER LAURIE:  Only you  
23          know --

24                  HEARING OFFICER VALKOSKY:  Yeah.

25                  PRESIDING MEMBER LAURIE:  -- whether

1       it's difference, because only you would have the  
2       data.

3               HEARING OFFICER VALKOSKY:  Yeah, I mean  
4       I think that's the question.  You seem to think  
5       it's -- at least the impression I'm getting, you  
6       seem to think it's publicly available information.  
7       Mr. Beers seems to think it's customized  
8       information.

9               MR. HARRIS:  Right, and I think Mr.  
10       Beers has gone beyond that and suggested, because  
11       other applicants may have waived their right to  
12       protect something, that we don't have a right to  
13       protect ours.

14              HEARING OFFICER VALKOSKY:  No, no, we're  
15       not -- no, we're not into the commercial aspects.  
16       I mean I understood Mr. Beers to say he has no  
17       interest in that.

18              MR. HARRIS:  Okay, well, --

19              HEARING OFFICER VALKOSKY:  Okay?  What  
20       we're looking for is -- I'm not even going to  
21       throw out a term like performance range or  
22       something, because that'll just create more  
23       trouble.

24              MR. HARRIS:  I understand.  You know,  
25       like I said, we can go back and we'll check.  But



1       if you're asking us if he doesn't want information  
2       about the commercial negotiations, then it sounds  
3       like what he's asking for is standard turbine  
4       operating information.

5               And that, to me, is probably publicly  
6       available. I can check and see whether it is  
7       publicly available, but if that's what we're down  
8       to now, I'm willing to go to websites and call  
9       vendors and see what I can find out about the  
10      Westinghouse --

11             HEARING OFFICER VALKOSKY: No, Mr.  
12      Beers, you have as much access to the web as  
13      anyone and you're not really looking for that type  
14      of information?

15             MR. BEERS: No, I'm really not. And I'm  
16      not interested in a lot of semantic games. For  
17      example, if they've gotten in data similar to  
18      this, and this is an initial quote they've  
19      obtained, --

20             MR. HARRIS: What is that, though? What  
21      is that? We don't know what that is.

22             MR. BEERS: It's the Siemens  
23      Westinghouse data that I've noted under tab 4.

24             MR. HARRIS: But we don't know whether  
25      that's a vendor guarantee or a standard

1 operating --

2 MR. BEERS: Please, can I finish?

3 MR. HARRIS: Well, you're asking me to  
4 produce something, and I'm responding.

5 MR. BEERS: No, --

6 HEARING OFFICER VALKOSKY: Mr. Harris,  
7 let Mr. Beers describe it first.

8 MR. BEERS: Okay. If they've gotten in  
9 information similar to this, which, you know, is  
10 the kind of thing you'd expect from any  
11 manufacturer when you're going to be making a  
12 major purchase that involves millions of dollars  
13 in terms of how that equipment is going to be able  
14 to produce.

15 If they've gotten in that kind of  
16 information, then I don't want it shielded from us  
17 on the ground that that may eventually form the  
18 basis for negotiating their ultimate performance  
19 guarantee by contract.

20 In other words, if they've got  
21 information from the vendor relating to the  
22 performance of the vendor's equipment for air  
23 quality purposes, setting forth the vendor's  
24 expectations about how that equipment will  
25 operate, let's see it.

1                   MR. HARRIS: Mr. Beers is cleverly  
2           playing in the privilege issue because that's his  
3           strongest argument. If we go back and look at the  
4           relevance question, as well, I think you're going  
5           to find that you probably approve projects not  
6           knowing whether or not they had vendor guarantees,  
7           because that information isn't relevant to a  
8           decision that this Commission has to make. It's  
9           wholly commercial.

10                   HEARING OFFICER VALKOSKY: Okay, and  
11           again we're getting back into the semantic thing.  
12           We're not talking about vendor guarantees as you  
13           refer to vendor guarantees.

14                   We're talking about general vendor data,  
15           okay, similar, if it exists, to that described in  
16           the referenced table. That is my understanding,  
17           and this is, as far as I'm concerned, a last  
18           chance unless you can convince me otherwise.

19                   (Pause.)

20                   HEARING OFFICER VALKOSKY: Okay,  
21           anything else, Mr. Beers? I mean did I accurately  
22           summarize the core of what you're looking at?

23                   MR. BEERS: That's correct, and we  
24           haven't discussed yet one of the other reasons why  
25           the appeal was filed, and that was because of the

1 Committee's language indicating that, as we  
2 interpreted it, that it didn't have independent  
3 jurisdiction over air quality matters.

4 I would suggest that the denial of the  
5 CVRP motion to compel be vacated, so that that, in  
6 its entirety is vacated, and that the Committee  
7 recognize that all of the issues that were raised  
8 there have become moot by virtue of the way in  
9 which the parties have agreed to them.

10 Except for the items 1D1 and '2, which  
11 we are waiting for the response on. And then that  
12 the Committee make whatever ruling it believes is  
13 appropriate on its own on item 4A, we're dealing  
14 with the vendor data.

15 HEARING OFFICER VALKOSKY: We'll take  
16 that under submission. Mr. Harris.

17 MR. HARRIS: Shockingly, we'll concur in  
18 that recommendation. I think it's important for  
19 all parties that there are no loose ends here.

20 So I would like, if the previous order  
21 is vacated, I'd like the reasons stated in our  
22 filing to be part of that. That these data  
23 requests, everything except for the three that are  
24 still outstanding, have been either withdrawn or  
25 the parties have reached a satisfactory result.

1           I think that's an important part of that  
2       ruling so that we're all clear exactly where we  
3       are, and that there aren't any loose ends in terms  
4       of the initial petition. Especially in light of  
5       the remand.

6           So, with that caveat.

7           HEARING OFFICER VALKOSKY: Okay, now to  
8       sum up, as I understand it, at next Tuesday's  
9       prehearing conference hopefully you'll provide us  
10      an update on 1D1 and 1D2.

11          And is there any question about your  
12      search, the type of information you're searching  
13      for in response to 4A? You know, I think we've  
14      had an extensive discussion on this.

15          PRESIDING MEMBER LAURIE: Well, let me  
16      tell you what my understanding is. My  
17      understanding is the information you're searching  
18      for in 4A is information supplied to you, the  
19      applicant, or indirectly to you, emanating from  
20      the vendor, that is a) upon a showing not  
21      otherwise available to the public, or b) not  
22      contained within a vendor guarantee as we have  
23      been able to define it today.

24          So if you search your files and  
25      everything you have you can indicate that all you

1 got to do is look up EPA and there it is, or some  
2 other public data pool and there it is, you can  
3 make that argument.

4 You've already indicated that you don't  
5 have a vendor guarantee at this point. So, that  
6 would not be at issue.

7 So the question is what source data do  
8 you have from the vendor that's not otherwise  
9 available to the public.

10 MR. HARRIS: Right, the b) part of  
11 your -- I took notes here, the second part, you  
12 said not within a vendor guarantee. That would  
13 include data that we're using in those ongoing  
14 negotiations, I would assume. That is excluded  
15 from what we're providing here.

16 MR. BEERS: No. I would argue strongly  
17 for that not being excluded unless they can  
18 establish that there's some trade secret involved  
19 here, or something of that sort.

20 In other words, they get data, it's data  
21 from the vendor. And the fact that it's known to  
22 both the vendor and the applicant. So nobody's  
23 disclosing anything that the other is not going to  
24 know.

25 If they want to negotiate about that

1 data in the future, fine. But let's see what  
2 they've gotten from the vendor.

3 MR. HARRIS: Sounds like we're back in  
4 the middle of the commercial negotiation.

5 CHAIRMAN KEESE: Let me ask, are you  
6 talking about data that they would give to any  
7 vendor? I mean are you talking about -- are we  
8 talking about Frame 7's, GFrame 7? I don't know  
9 what we're talking about. Westinghouse.

10 Are you talking about the document that  
11 Westinghouse would give to anybody who wanted to  
12 buy a Westinghouse?

13 MR. BEERS: I don't know that it's a  
14 single document that they have to give to every  
15 prospective purchaser.

16 CHAIRMAN KEESE: Because I'm thinking of  
17 your car analogy, you know, it's got this kind of  
18 tires, and it's got this kind of air conditioning,  
19 and it's got this, and this, and this. And it's a  
20 printed document that you get.

21 MR. BEERS: Right, and I also --

22 CHAIRMAN KEESE: That's starters. And  
23 then --

24 MR. BEERS: That's for starters, but if  
25 I wanted to buy --

1                   CHAIRMAN KEESE:  -- if you start  
2     negotiating whether you're going to get white  
3     sidewalls, is that what you want?

4                   MR. BEERS:  If what I was --

5                   CHAIRMAN KEESE:  I mean do you want  
6     anything other than the standard offer that they  
7     first make?  Westinghouse says, here's what we've  
8     got, and here's what it will do.  And then, so  
9     they want something a little different.  Are you -  
10    - you have a right to what's different that they  
11    ask for?

12                  MR. BEERS:  If they want different kind  
13    of equipment, then I think I'm entitled to know  
14    from Westinghouse how that different kind of  
15    equipment will perform.

16                  Obviously, for the small car I bought my  
17    daughter, I got a brochure.  If I'd been buying  
18    her a Hummer, I'm sure I would have gotten more  
19    data from the manufacturer.  I mean --

20                  CHAIRMAN KEESE:  Well, I'm pretty sure  
21    that Westinghouse has a document.

22                  MR. BEERS:  I bet.

23                  CHAIRMAN KEESE:  I mean that says, you  
24    know, it may not be called a Frame 7, but here's  
25    what it will do.



1 MR. BEERS: Right.

2 CHAIRMAN KEESE: And here's how it's  
3 been tested. And then you start fiddling with a  
4 new way of controlling the technology a little  
5 more, emissions a little more. Is that --

6 MR. BEERS: I want any information that  
7 they've obtained from Westinghouse that deals with  
8 how this equipment is expected by the vendor to  
9 perform in air quality terms.

10 And I've used as examples the documents  
11 we've got under tab 4. But if they got an initial  
12 document, and then they went back to Westinghouse  
13 and said, well, but we'd like the equipment to be  
14 configured a little bit differently, how do you  
15 think it would perform under those conditions,  
16 then I think we're entitled to see that.

17 And, again, what concerns me about the  
18 way it's being expressed by Mr. Harris is that  
19 ultimately all of this information that they get  
20 may be used in some way to negotiate a commercial  
21 guarantee.

22 But that doesn't provide any  
23 confidentiality to the basic data that they're  
24 getting. And I think we're entitled to see that  
25 data just as people participating in other

1 proceedings were entitled to see similar data  
2 sheets.

3 CHAIRMAN KEESE: My understanding, Mr.  
4 Chairman, is that what we're trying to do is we're  
5 really trying to establish one way or another best  
6 available control technology, right?

7 And once we've established best  
8 available control technology they've got to meet  
9 it. And they've got to put on prima facie case  
10 that they're going to meet it.

11 But they have to meet it eventually.

12 Now, are you working on the best  
13 available control technology? Is that what you're  
14 concerned about? Or are you concerned about how  
15 they're going to meet it?

16 MR. BEERS: I'm concerned about both of  
17 those items, but I'm also concerned about the fact  
18 that we've been told and given the results of  
19 certain source tests that indicate that there are  
20 problems associated with different pollutants with  
21 respect to the Pasadena facility.

22 And we're also told that we've got a  
23 better model --

24 CHAIRMAN KEESE: So that Pasadena is now  
25 best available control technology at a higher

1 level?

2 MR. BEERS: Well, in other words, one of  
3 the other reasons we want this information is that  
4 we get these source tests from Pasadena, which  
5 they used to predict how this plant is going to  
6 operate.

7 But when the information they get from  
8 Pasadena indicates that there will be problems,  
9 one of the --

10 CHAIRMAN KEESE: Okay, but this is --

11 MR. BEERS: -- things they say is  
12 this --

13 CHAIRMAN KEESE: -- but what they're  
14 going to do is not -- best available control  
15 technology is determined by what's happened  
16 someplace else, not at their plant, right? Isn't  
17 that how we get to best available control  
18 technology? It's what's happened someplace else?

19 MR. BEERS: Correct, but --

20 CHAIRMAN KEESE: And if they're going to  
21 beat it, it doesn't set the standard for them.  
22 This is the standard.

23 MR. BEERS: It's what's achievable.

24 CHAIRMAN KEESE: Achievable in practice,  
25 but not in theory.

1 MR. BEERS: Correct.

2 CHAIRMAN KEESE: So that would be off  
3 something that's tested, not off what somebody --  
4 I mean I think we've had this fight about SCONOX,  
5 you know, won't work. Or do you test it in  
6 something small and then extrapolate and say it'll  
7 work?

8 I'm concerned about the division here,  
9 about setting the standard, and doing the  
10 compliance. And I can understand how you have --  
11 you could argue with us a lot and give us a lot of  
12 input on what the standard is. But I wonder about  
13 how much you go once they've given the prima facie  
14 case that they're going to meet it. How far do we  
15 go to establish that they'll meet it? Staff?

16 I mean if they say they've got equipment  
17 that will meet it, do we check it out, inspect it?

18 MR. RATLIFF: In my experience although  
19 we've had conflict over what BACT should be, we  
20 haven't -- there usually hasn't been conflict over  
21 whether or not you could meet BACT. Because BACT  
22 is, by definition, supposed to be something that  
23 has been achieved and is achieved --

24 CHAIRMAN KEESE: It's supposed to be a  
25 generic product that achieves a standard.

1           MR. RATLIFF: Right, I mean presumably  
2       BACT is set in accordance with existing facilities  
3       that are generating electricity and meeting that  
4       level of emissions. So usually we haven't had  
5       conflict over whether BACT is achievable.

6           CHAIRMAN KEESE: Are we even going to  
7       discuss these kind of issues in the siting case?

8           MR. RATLIFF: Well, we haven't really  
9       even talked today about what particular emissions  
10      are at the bottom of this concern. And that might  
11      be one of the reasons that we don't know if we're  
12      talking about NOx, or if we're talking about PM10,  
13      or are we talking about something else.

14          But, typically, I mean CARB and EPA  
15      have, I think, substantially body of evidence  
16      about what is obtainable under existing control  
17      technologies. And examples of power plants that  
18      exist. And I assume that's not what we're going  
19      to fight about.

20          CHAIRMAN KEESE: Exactly. You follow  
21      what I'm trying to -- I'm saying their plant is  
22      not going to establish the standard. The generic  
23      documents that would seem to me are what's going  
24      to set the standard, not what anyone offers them.

25          So, we get settled with that. What's

1 the generic standard. What is our standard.

2 Then, the second question of how are  
3 they going to meet it seems to me a separate  
4 question. And how much of that is important to  
5 us? I mean if they say they're buying the  
6 Westinghouse 6, and all the records show  
7 Westinghouse 6 can never meet it, then I think  
8 it's significant.

9 But if Westinghouse 6 meets it, are we  
10 going to, in this siting case, deal with that?  
11 Are you suggesting we do? I mean really I'm naive  
12 here. Help me.

13 MR. BEERS: I'm suggesting a couple of  
14 things. One of them is that it would be useful to  
15 have the vendors own view of the equipment that  
16 they're planning on purchasing to use in this  
17 facility in order to be able to have that  
18 information to evaluate other information we're  
19 receiving.

20 For example, we're receiving information  
21 about how equipment is performing at a facility in  
22 Pasadena, Texas. We're not in Pasadena when those  
23 tests are being done. We don't know what's being  
24 performed there, and how that's being done, but we  
25 get that data back and we're expected to draw

1 certain inferences from it.

2 And another piece of relevant data is  
3 how the manufacturer of this particular piece of  
4 equipment, itself, says the equipment will  
5 perform. That would aid us in judging this other  
6 information we're receiving.

7 And one of the things they say in regard  
8 to some of this Pasadena source tests, when the  
9 results are unfavorable, is that we've got a  
10 better model of that turbine that we're going to  
11 use in this facility there, not to worry about  
12 those particular results.

13 CHAIRMAN KEESE: Okay, so you're saying  
14 that what the vendor is saying is the standard's  
15 okay; it meets best available control technology.  
16 Our piece of equipment will meet it. And it's up  
17 to them to do it.

18 Do we go further, Mr. Chairman? Are we  
19 going to go further once we've established what  
20 BACT is, and that they're buying a piece of  
21 equipment that they believe can meet it, are we  
22 going to go any further in our Committee process?

23 PRESIDING MEMBER LAURIE: Okay, I've  
24 missed the last ten minutes of your conversation,  
25 but I know where we were before that, and I

1       thought the question was what information does the  
2       applicant have, supplied by the vendor, as to the  
3       performance levels for this project that is not  
4       contained within a vendor guarantee.

5               That's the information that I think  
6       we're looking for, and I think that's the  
7       information that Mr. Harris has indicated that he  
8       will provide.

9               MR. HARRIS:   Within the vendor  
10      guarantee, that phrase to me is key in what you  
11      said, because to the extent that the information  
12      is publicly available, we can get it.  We can call  
13      Westinghouse and get the Accura brochure as easy  
14      as anybody else.

15              To the extent we have other information  
16      that's not that standard operating information, it  
17      is within -- and I'm not saying we have it, I  
18      don't even know that we have any -- but if we did,  
19      and we do, to the extent we have that type of  
20      information it's available solely for the  
21      commercial negotiation about the price of the  
22      turbine.

23              And I would consider that to be within  
24      the context of the commercial vendor guarantee.  
25      And if you go back again to the wording of the



1 data request, that's what we're talking about  
2 here.

3 You know, I keep coming back to the  
4 question of relevance. And I really want the  
5 Commission to think hard about the precedent that  
6 it could be establishing here. Because you know,  
7 part of what you'd be saying to the applicants in  
8 the future is that you're better off, applicant,  
9 not to start these commercial negotiations until  
10 you get your license.

11 And that can't be the result that the  
12 Commission wants. But that may be an unattended  
13 consequence of this kind of an opening up of a  
14 commercial issue in the regulatory setting. And I  
15 think that potential precedent is one that ought  
16 to weigh heavily in this consideration. It's  
17 certainly the reason the joint venture has asked  
18 me to come here today, because it, on a going  
19 forward basis, has some very dire ramifications  
20 for the process. And they're not positive.

21 And if you get back to the question of  
22 relevance, you know, we can't be the result that  
23 if we stopped the commercial negotiations, or we  
24 decide not to even have vendor guarantees, that  
25 that's a better result, either.

1                   We're left in a situation where this  
2           whole thing is driven -- let me use an extreme  
3           example. You know, if we decided to end any  
4           vendor negotiations until post-licensing, you  
5           know, there's no motion to compel vendor  
6           negotiations, because it's not relevant.

7                   PRESIDING MEMBER LAURIE: Are you  
8           prepared to review your files to determine whether  
9           or not you have any information not ordinarily  
10          available to the public that is not part of your  
11          commercial negotiations?

12                  MR. HARRIS: That we can do, yes,  
13          certainly.

14                  MR. BEERS: And, again, I'm concerned  
15          that they so readily agree to that, because they  
16          want to wrap this notion of what's part of  
17          commercial negotiations around every bit of data  
18          they've gotten.

19                  And there's been no basis established  
20          for a protection of confidentiality for data  
21          that's been obtained, even if that data is later  
22          going to enter into a negotiation process.

23                  And I guess if you want to talk about  
24          weighty considerations, I find it astonishing that  
25          we would have spent an hour and a half arguing

1       about whether or not an applicant should provide  
2       information from the vendor of the equipment that  
3       it proposes to use in a facility about how that  
4       equipment will operate in a proceeding before an  
5       agency that's supposed to be siting that facility,  
6       or reviewing whether it's going to be issuing a  
7       license for that facility.

8               PRESIDING MEMBER LAURIE: Well,  
9       applicant's position is they have provided data,  
10      they provided the source data. And that's all  
11      they've had. That's been their position. Any  
12      additional information relates solely to the  
13      commercial transaction relating to the vendor  
14      guarantee.

15             MR. BEERS: But there's no  
16      confidentiality for the commercial negotiation,  
17      itself.

18             PRESIDING MEMBER LAURIE: Yeah, but it's  
19      a question of relevance.

20             MR. BEERS: But the data that's provided  
21      by the vendor in the course of that relationship  
22      with this company is not protected, and clearly is  
23      relevant. I mean, what the vendor says its  
24      equipment can do, whether it's provided on a  
25      website or whether it's provided to you when you

1       come in and say I want to purchase some of your  
2       equipment, seems to me to be relevant.

3               CHAIRMAN KEESE: But it's only relevant  
4       if we, as a Committee, are going to take it into  
5       consideration at some time. And I don't think  
6       you've gotten beyond -- a lot of that stuff is  
7       relevant in setting what BACT is. But as far as  
8       they're complying with BACT, are we going to try  
9       that? I mean are we going to take testimony as to  
10      whether what they're proposing is going to meet  
11      the standard?

12             MR. BEERS: I think with --

13             CHAIRMAN KEESE: They're obligated to  
14      meet the standards.

15             MR. BEERS: We certainly are going to  
16      take -- have testimony, I would assume, by staff  
17      and applicant. And by CVRP relating to whether or  
18      not they are proposing to use best available  
19      control technology.

20             CHAIRMAN KEESE: Right, to meet the  
21      standards.

22             MR. BEERS: That's my understanding that  
23      staff has already submitted testimony on that. I  
24      expect the applicant to. And I expect CVRP to.  
25      Obviously that's information and opinions that

1 will be developed on the basis of information  
2 about what various kinds of equipment is expected  
3 to do.

4 And it's again hard for me to believe  
5 that what the manufacturer of that equipment has  
6 to say isn't material.

7 PRESIDING MEMBER LAURIE: The matter  
8 will be deemed submitted.

9 Mr. Valkosky, did you have a closing  
10 comment?

11 HEARING OFFICER VALKOSKY: As I --

12 MR. RATLIFF: Before you do could I  
13 just, I don't want to beat, to flail what I hope  
14 is a dead horse, but I did want to at least join  
15 with the other parties here in saying that we hope  
16 the current opinion, in any case, will be vacated.  
17 And that any future opinion, if there is one,  
18 would be based on the regulation regarding data  
19 requests.

20 PRESIDING MEMBER LAURIE: Mr. Valkosky,  
21 what I think we'd like to do is leave this matter  
22 open until the 8th, and determine --

23 (Pause.)

24 PRESIDING MEMBER LAURIE: -- until the  
25 9th, and determine, Mr. Harris, what additional

1 information or what your position will be after  
2 you review your records. And we'll just keep the  
3 matter open and available for further discussion.

4 Okay.

5 MR. BEERS: Could I raise one other  
6 point, and it is we've had some difficulty in  
7 receiving timely submittals from the applicant.  
8 And they will not provide us with email. And I  
9 was hoping we could get service by email or get it  
10 Federal Express.

11 We've been providing them, at least  
12 since I've been involved, with email submittals.  
13 And the timing on this is getting very tight, and  
14 I want to make sure that we have all the time that  
15 we're entitled to in reviewing documents.

16 HEARING OFFICER VALKOSKY: And you've  
17 agreed to receive service by email?

18 MR. BEERS: Beg your pardon?

19 HEARING OFFICER VALKOSKY: You've agreed  
20 to receive service by email?

21 MR. BEERS: We've been providing them  
22 with service by email.

23 HEARING OFFICER VALKOSKY: Yes, but you  
24 have agreed to be served by email?

25 MR. BEERS: We would be happy to be

1 served by email, that's what I'm saying.

2 HEARING OFFICER VALKOSKY: Is there any  
3 problem?

4 MR. HARRIS: Yes. We're not interested  
5 in email service. To clear things up in terms of  
6 on the going forward basis I think the  
7 relationship here is good. We did fax on the  
8 29th, the same day we filed it, we faxed to Mr.  
9 Beers and to Ms. Tilton.

10 Frankly, I am concerned about electronic  
11 service for a whole lot of reasons, not the least  
12 of which is that people tend to serve and re-serve  
13 documents after spell checking and making minor  
14 changes.

15 But setting that issue aside, I think  
16 there is a question of protecting the privilege.  
17 We circulate documents among numerous people,  
18 privileged information is inserted in the prior  
19 drafts. And I know that certain people have the  
20 ability to reverse engineer into prior drafts.  
21 And I don't want my attorney/client notes to be  
22 publicly available.

23 And so on that basis we've elected not  
24 to do email service. We are willing though to try  
25 to reach some accommodation in terms of making the

1 service more efficient.

2 MR. BEERS: Maybe Federal Express in  
3 circumstances in which --

4 HEARING OFFICER VALKOSKY: Okay, I mean  
5 there are different ways of doing it.

6 MR. HARRIS: Yeah, like I said, when we  
7 had this last discussion after our meeting on the  
8 21st we both agreed -- they emailed to me on the  
9 26th; I faxed to them on the 29th. So they have  
10 basically, and on a going forward basis we're  
11 completely amenable to that kind of reasonable  
12 accommodation.

13 I just want to protect the electronic  
14 version, so.

15 HEARING OFFICER VALKOSKY: That's fine  
16 as long as, you know, they get it quickly. FedEx  
17 would be fine.

18 Thank you.

19 (Whereupon, at 4:45 p.m., the matter was  
20 concluded.)

21 --o0o--

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## CERTIFICATE OF REPORTER

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